No. 20939

In the

United States Court of Appeals

For the Ninth Circuit

WESTERN CONSTRUCTORS, INC., a corporation,
Counterclaimant-Appellant,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Counterdefendant-Appellee.

WESTERN CONSTRUCTORS, INC., a corporation,
Defendant-Appellant,
vs.
SOUTHERN PACIFIC COMPANY, a corporation,
Plaintiff-Appellee.

Brief of Counterdefendant-Appellee and Plaintiff-Appellee Southern Pacific Company

Appeal from the United States District Court for the District of Arizona

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

TEXTS

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STATEMENT OF THE CASE

In 1963 the Arizona Highway Department of the State of Arizona was engaged in construction work upon a highway in close proximity to and generally paralleling the main line of Appellee's railroad. Contractors proposing to bid upon the work were advised by the State that a private railroad crossing would be made available to contractors so that earth could be moved from the opposite side of the railroad right-of-way to the construction site, since this was to be

the source of earth necessary to build up the grade of the highway. The State further advised contractors that the railroad company's formal approval of such a crossing was anticipated but that the railroad company would require that the contractor enter into an agreement with the company covering the crossing. (R.T. 91-105) As a matter of interest but not of material importance, the area where the earth was to be taken from could be physically reached by means other than crossing the railroad tracks, namely, by using a railroad overpass adjacent to the area. (Ex. 5)

Appellant, Western Constructors, Inc., was the successful bidder for this project and it executed the Private Roadway Agreement over which this lawsuit arose. (Ex. 4) The Agreement contains this provision: "In consideration of the exposure to hazard of the operations of railroad by reason of the construction, maintenance and use of said roadway, licensee does hereby release and agree to indemnify and save railroad harmless from and against all liability, claims, costs and expenses for loss of or damage to property of either party hereto or of third persons, and for injuries to or deaths of licensee or the agents, employees or invitees of licensee or third persons or the employees of railroad caused by or arising out of the presence, maintenance, use or removal of said roadway, regardless of any negligence or alleged negligence on the part of any employee of railroad."

Other pertinent provisions of said Private Roadway Agreement are:

> Clause 3. All vehicles shall come to a complete stop before crossing the tracks at the above location, and shall not proceed across said tracks until it has been ascertained that it is safe to do so. Licensee shall not obstruct, or interfere with, the passage of railroad's trains.

Clause 11. Licensee, at licensee's expense, shall provide a competent flagman satisfactory to railroad for the control of vehicular traffic while said roadway is being used by licensee.

Clause 13. Railroad, for and on behalf of licensee, shall provide the necessary labor and materials for and shall: (a) install a signal indicator, together with the necessary appurtenances, in the approximate location indicated on said print; said indicator being required as an adequate warning device for licensee's flagman at said roadway of approaching railroad trains.

Pursuant to the Agreement the railroad crossing in question was provided, together with a flagman for the control of vehicular traffic employed by Western, and together with a signal indicator at the crossing to indicate when and from what direction a train was approaching. In addition to these safeguards there was another mechanical safety device installed at the crossing. This was a switch which would activate the railroad block signal located half a mile east of this crossing. By activating this signal any train approaching from the east could be warned to stop. (R.T. 138-141, 152)

This was the indemnity Agreement exacted by the railroad in consideration of the hazard created by the existence and use of the crossing, and these were the precautions taken by the railroad to guard against accidents.

This was the railroad's main line and numerous trains used it each day at all hours. Its trains customarily operated in this area at 65 miles per hour. (R.T. 137, 138) The train involved in the collision that is the subject of this lawsuit was traveling about 63 miles per hour as it approached the crossing. (R.T. 337)

On one or more occasions prior to the accident the railroad engineer had observed Western's vehicles crossing too close (he deemed) in front of his train as he was approaching, and he reported his concern to his superiors. (R.T. 329-335) The railroad, in turn, complained to Western that its drivers were not stopping their vehicles at the crossing. (R.T. 414, 415)

On October 24, 1963 a collision occurred at said crossing between a westbound 80-car freight train and one of Western's carryalls driven by Harold Kness which had stalled afoul of the crossing. The collision resulted in derailment of the train and monumental damages. The facts immediately surrounding the collision, taking the evidence most favorable to Western where there was any conflict therein, are as follows:

Avila was Western's flagman at the crossing; it was his job to watch for trains. (R.T. 202-239) It was his job to watch the mechanical indicator which would indicate when and from what direction a train was approaching. (R.T. 205, 206, 222) It was his job to throw the switch that controlled the railroad block signals half a mile away, to stop a train if necessary. (R.T. 224, 225) It was his job to control Western's vehicles at the crossing. (R.T. 221-224) Avila saw the train coming from the east when it was over a mile and a half away, at which time he gave Kness permission to negotiate the crossing. (R.T. 206, 212, 124) Kness proceeded to do so and as his carryall came up onto the tracks the engine quit. (R.T. 125, 126) At this point the train was a mile to a mile and a half away. (R.T. 127, 128) Kness threw the engine into neutral gear, pumped the accelerator to try to keep it alive but it failed and he jumped off to try to push it on over the tracks, yelling to Avila to help him. (R.T. 128, 166, 167) When Avila saw the carryall

stalling, his first impulse was to throw the block signal switch but instead he responded to Kness' call for help. (R.T. 214) The carryall continued to roll until it was almost clear of the crossing. (R.T. 167) At or about the time it stopped rolling, both Kness and Avila looked up and noticed that one of the headlights of the train was red. (R.T. 186-189, 234) At this point the train was near the block signal half a mile away. (R.T. 169, 218) Avila and Kness abandoned their futile efforts to push the carryall clear of the crossing and fled for their own safety. The significance of the red headlight on the train is this: Under ordinary conditions the headlight is white but when the train brakes are put in emergency this light turns red automatically. (R.T. 405, 406) Other than applying the brakes there was nothing more that the train operators could do except blow the whistle and ring the bell, which they were doing. (R.T. 265, 267, 336) To the operator of the train the carryall first appeared to stall on the tracks, then start up again and stall a second time, almost in the clear. When it first came upon the tracks and appeared to stall, the engineer made a service application of the train brakes, then when the carryall stopped finally the engineer placed the train in full emergency. (R.T. 322-412) The distances at which these events occurred may be in some conflict insofar as the testimony of the engineer is concerned, inasmuch as he corrected his original estimates. These were based upon how far away he thought certain landmarks were from the crossing. Later, upon actual measurement of the distance from the crossing to the landmarks, he corrected his estimates.

His estimates of the distances involved are compared as follows:

A. By Deposition or Affidavit	B. Trial Testimony
(1) First saw the carryall approaching the crossing when the train was approximately one-half mile away. (R.T. 381)	First saw the carryall approaching crossing when train was opposite water tanks (R.T. 357), which prove to be one and a half miles away. (R.T. 347, 348)
(2) When the train was approximately half a mile or 600 or 700 yards away the carryall appeared to stop on the crossing. (R.T. 372, 385, 388)	When the train was about three-fourths of a mile away the carryall appeared to stop on the crossing. (R.T. 359)
(3) The carryall stopped finally and the train was placed in emergency when opposite the old depot building 300 yards away. (R.T. 373, 408)	Upon actual measurement the old depot building is one-half mile away. (R.T. 409, 374, 375)

The testimony of the two other train crewmen, Brothers, the fireman, and Ameling, the head brakeman, was that the train was placed in emergency half a mile to three-quarters of a mile away. (R.T. 276, 277, 303) All of the evidence showed that it would have taken a mile to a mile and a half to stop this train in emergency. (R.T. 286, 304, 408) After the train was placed in emergency all three train crewmen hit the deck for their own safety in view of the impending collision. All four engines and many of the cars behind them derailed. The highway overpass structure loomed directly ahead beyond the crossing but fortunately the engines needled their way through the aperture. The cars behind them were not so fortunate and stacked up against the overpass. Fortunately this was a freight train.

The speed tape recording (Ex. V), to which Appellant's brief refers, is only evidence that at the moment of impact

the train's speed had only reduced to about 60 miles per hour. It does not raise the inference suggested by Appellant that the brakes weren't applied until at or just immediately before the collision. The significance of the red headlight seen by Avila and Kness (Western's own employees and witnesses) when the train was half a mile away proves that the brakes were on then and prohibits any such inference. It must be remembered that this was an 80-car freight train, loaded with merchandise, powered by four locomotives, going 63 miles per hour, and that it takes up to a mile and a half to stop such a train. Under the circumstances the only permissible inference raised by the speed tape is that during approximately the first half mile of brake application the train's inertia was not yet overcome and its speed not much affected.

The trial court directed a verdict in favor of Appellee and entered judgment establishing Appellant's liability under the indemnity agreement of the parties for damages sustained by Appellee. The basis for the court's judgment was that the indemnity Agreement applied and that there was insufficient evidence of wanton negligence to support Appellant's defense.

Appellant raises two questions basically:

(A) Appellant claims there was sufficient evidence of wanton negligence on the part of Appellee to go to the jury for determination.

(B) The indemnity Agreement is equivocal and ambiguous, and properly construed, did not indemnify Appellee against the losses incurred in this accident.

ARGUMENT

There Was No Evidence of Wanton Negligence

It is to be conceded that if there was evidence of wanton negligence on the part of Appellee, determination of the

case should have been left to the jury, because the District Judge properly held that the indemnity Agreement would not be enforceable upon public policy grounds if wanton negligence was involved. But, we submit, the District Judge properly found there was insufficient evidence of any wanton negligence on the part of Appellee to justify submitting the matter to the jury.

Appellant cites *S.P. v. Barnes* (Arizona Court of Civil Appeals, Div. 2, June 17, 1966) and *Alires v. S.P.*, 93 Ariz. 97, 378 P.2d 913 (1963) as support for its argument that evidence of wanton negligence existed. Those cases are clearly no parallel to the one at bar; they both involved heavily-traveled public crossings, where there was no flagman and no mechanical warning devices. The case at bar involves a private road crossing, where a number of special safeguards were provided; there was a flagman; there was a mechanical indicator affording advance warning of a train's approach; and there was a special switch for controlling the railroad block signals by which oncoming trains are governed.

The *Alires* case is clearly distinguishable on other facts; that accident occurred at night; it occurred within the city limits; there were obstructions to the motorist's view; and the train was going 79 miles per hour.

The *Barnes* case is also distinguishable on other facts. There was evidence the train was going 80 miles per hour. There were obstructions to the view. The accident occurred at night, and in the environs of a populous city, Tucson. The court pointed out that the crossing was more heavily traveled than in *Alires*.

In the case at bar, none of these factors was present; the accident did not occur at night; there was no city (large or small) even in sight; and there were no obstructions to the view.

The cited case of *Bryan v. S.P.*, 79 Ariz. 253, 286 P.2d 781 (1955) is also clearly inapplicable. That case involved making a "flying switch" of unlighted freight cars (without brakes and out of control) at night, and without warning signals or flagmen, being kicked over a public crossing downtown in the City of Phoenix.

We must pause here to observe that it was obviously the intent of the Private Roadway Agreement, with the safeguards and warning devices provided, that the railroad company's trains would be able to operate as before, when there was no private crossing. The crossing was clearly of no benefit to the railroad company. It was under no obligation to provide such a crossing. It was purely an accommodation.

We turn now to the definition of the term "wanton negligence", in order to review the District Judge's decision that evidence thereof was insufficient in this case to create an issue for the jury.

Before the introduction of evidence in the case, the District Judge gave the following definition of wanton negligence to the jury:

> "The word 'wanton' as used, as I will use it in the instructions I will give you, indicates a reckless disregard of the rights of others, or a reckless indifference to the results.
>
> In this connection, I instruct you that by a reckless disregard for the rights of others, or reckless indifference to results, as those words have just been used, is meant the intentional doing, an intentional doing of an act, or the failure to do an act which it was the duty of the defendant to do, with knowledge on his part or its part, or reason to have knowledge of facts which would lead a reasonable man to realize that his conduct not only created an unreasonable risk of bodily harm to people on this railroad, on this track, or on the private

> roadway, but also a high degree of probability that substantial harm would result to such persons." (42)

The foregoing was taken from Instruction No. 16 of the Arizona Uniform Jury Instructions (R.T. 34). That it is a proper definition is evidenced by *Butane Corp. v. Kirby,* 66 Ariz. 272, 187 P.2d 325; *Barry v. S.P. Co.,* 64 Ariz. 116, 166 P.2d 825; and *Scott v. Scott,* 75 Ariz. 116, 252 P.2d 571, 575, wherein the court said "wanton negligence is highly potent, and when it is present it fairly proclaims itself in no uncertain terms. It is in the air, so to speak. It is flagrant and evinces a lawless and destructive spirit".

With the above definition in mind, can it be said that the conduct of Appellee or its employees was wanton, assuming arguendo that it was negligent at all?

Notwithstanding Appellant's play upon the testimony, the facts are quite simple. Unless one wants to ignore the uncontradicted evidence and believe that the train operators were suicide-bent, one must find and conclude that they put the train in emergency at a time they thought that there was a necessity for doing so. Now if Appellant wants to quarrel with whether the brakes should have been applied three-fourths of a mile away instead of one-half mile away, that is purely a matter of judgment and at most would bear on the question of simple negligence only. In *Butane Corp. v. Kirby, supra,* the court said:

> "Although conduct to be reckless must be negligent in that it is unreasonable, it must be something more than negligent. It must not only be unreasonable, but it must contain a risk of harm to others in excess of that necessary to make the conduct unreasonable, and therefore, negligent. It must involve an easily perceptible danger of substantial bodily harm or death and the chance that it will so result must be great."

In any case, there is no evidence to show that the train could have been stopped by applying the brakes the moment that the carryall went onto the tracks and stalled, under any interpretation of the testimony.

Appellant suggests that engineer Henderson was wanton in approaching this crossing at over 60 miles per hour in view of his previous experiences with carryalls crossing too close in front of his trains. This accident was not caused by a vehicle crossing too close in front of the train. If it had not stalled it would have crossed when the train was over a mile away. Moreover, why shouldn't engineer Henderson have continued to operate his trains at 60-65 miles per hour, as was customary and allowable? He had duly reported his observation and concern to the Company, and it in turn registered some complaint with Western. Why should he be required to assume that careless driving would take place at the crossing on the day of the accident? As a matter of fact, such did not take place. So the argument is at most academic, and if it had any merit to it, it would concern at best only simple negligence. Besides, if a motorist is in the habit of coming too close to a train at 65 miles per hour, what is to prevent him from coming too close at 30 miles per hour? In either situation the locomotive engineer has no control over such a situation, regardless of his speed, unless he brings his train to a complete stop at the crossing every time. Such was never intended by the Agreement.

Appellant also argues that there is evidence to indicate that engineer Henderson was not keeping a proper lookout ahead. There is no such evidence. The fact that there was some variance between Henderson's account of the movements of the vehicle at the crossing and Kness' account of same, is no inference that Henderson was not looking. He described what he saw, as it appeared to him from a consid-

erable distance away. His remark of concern to the fireman when he saw the carryall approach the crossing from over one-half mile away, "I hope he stops" (R.T. 292, 293); his sounding of the whistle and ringing of the bell; and his placement of the train in emergency half a mile away; these are undisputable facts which prove Henderson was maintaining a lookout. Moreover, failure to keep a proper lookout would not amount to wanton negligence, for there was no reason to anticipate that a vehicle would stall on the tracks. None had ever stalled before. Particularly in view of all the precautions and warning devices which had been provided for the protection of this crossing so as to ensure the right of way and safety of Appellee's trains, the operators of the train had no reason to anticipate that the crossing would be obstructed. Furthermore, we take the position that because of such precautions and right of way preserved by the Agreement, the railroad company had a right to operate its trains by remote control if it so desired, without any lookout. So we do not concede for a moment that there is even any evidence of simple negligence, although we need not go that far to support the District Judge's ruling.

In conclusion, we come back to the testimony of Kness, Western's carryall operator, for conclusive proof that Appellee was not guilty of wanton negligence. Remember that when his machine started to go upon the crossing the train was then only a mile or better away. And remember that it takes from one to one and a half miles to stop this train. There was no reason to place it in emergency at this point, because Kness' machine was still moving, and anyway, whether the train could have stopped in that distance would be sheer conjecture. The carryall continued to roll until it was almost entirely in the clear. When it stopped and could go no further Kness looked up and saw the red head-

light. This means that the emergency brakes were on at that time. The train was then one-half mile away. These are the cold facts. They do not evince any lawless and destructive spirit on the part of anyone, least of all the operators of the train. In our opinion these facts do not even constitute evidence of simple negligence. There is insufficient evidence to indicate that there was any possibility of avoiding the collision even when the carryall first went onto the crossing, much less afterwards when it stopped. And even if there were such a possibility, failure to take advantage of it at that time would only be an error of judgment—not wanton negligence.

There was nothing for the jury to try, and the District Judge properly directed a verdict for Appellee.

The Collision Was Caused by or Arose Out of the Presence, Maintenance, Use or Removal of Said Roadway

The indemnity Agreement is unequivocal and unambiguous. It plainly provides indemnity for any loss to Appellee "caused by or arising out of the presence, maintenance, use or removal of said roadway, regardless of any negligence or alleged negligence on the part of any employee of Railroad". The above indemnifying clause even commences by stating why, viz: "In consideration of the exposure to hazard of the operations of Railroad by reason of the construction, maintenance and use of said roadway, * * *"

The unmistakable intent of the Agreement is further manifested by these additional provisions: That Appellant "shall not obstruct, or interfere with, the passage of Railroad's trains" (Clause 3); and that Appellant shall carry insurance covering its liability under the contract, with limits of not less than $250,000 property damage (Clause 22).

Appellant's argument that the collision and resulting damages to Appellee were proximately caused by the negligence of Appellee and, therefore, were not "caused by or arising out of the presence, maintenance, use or removal of said roadway" is wholly without merit. The courts have universally held that the term "arise out of" or "arising out of" is not to be confused with proximate cause. In other words, it is clear that, from the standpoint of negligence law, the negligent manner (if any) of operating Appellee's train could be deemed to be the proximate cause of the collision without negating the fact that the collision was caused by or arose out of the presence, maintenance or use of the private roadway. In *Schmidt v. Utilities Ins. Co.*, 182 S.W.2d 181, 154 A.L.R. 1088 (Mo. 1944), the court said that the words "arising out of" were ordinarily understood to mean "originating from" or "having its origin in", "growing out of" or "flowing from". The court also said:

> "The policy, by its terms, does not require a finding that the injury to respondent was directly and proximately caused by the use of the automobile, or caused by the automobile itself, or that the injury occurred while the automobile was in motion or operation. * * * We must hold that the policy in suit does not require that the injury be the direct and proximate result, in any strict legal sense of that term, of the use of the automobile covered by the policy."

In *Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571 (Pa. 1961), the court said that "arising out of" means causally connected with, not proximately caused by, and that a "but for" causation, that is, a cause and result relationship, is enough to satisfy the provision of the policy.

In the case of *Merchants Co. v. Hartford Accident & Indemnity Co.*, 188 So. 571 (Miss. 1939), where the injury was caused by poles negligently left in the road after the

covered vehicle had been extricated from a ditch and had departed, the court said:

> "Our conclusion, under a policy such as is here before us, is that where a dangerous situation causing injury is one which arose out of or had its source in, the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation,—which is to say, that the event which breaks the chain, and which, therefore, would exclude liability under the automobile policy, must be an event which bears no direct or substantial relation to the use or operation; and until an event of the latter nature transpires, the liability under the policy exists."

In the case of *Eastern Trans. Co. v. Liberty Mutual Cas. Co.*, 144 A.2d 911 (N.H. 1958), in which the question was whether or not an accident arose out of the permitted use of the insured vehicle, the court said:

> "The Liberty policy does not require a finding that the injury to Bundy was directly and proximately caused by the use of the Emerson vehicle but only that the injuries were caused by accident 'arising out of the ownership, maintenance or use of the automobile.'"

In the case of *Avery v. American Automobile Ins. Co.*, 166 S.W. 2d 471 (Mo. 1942), the policy covered injuries caused by equipment rented or leased by the assured. A person was injured by a pump (a piece of equipment rented or leased by the assured), when skids, on which it was being lowered, gave way. The court recognized that the defective skid was the proximate cause of the pump's fall, rather than any defect in the pump. The court, nevertheless, held that the injury was "caused by" the leased equipment within the provisions of the policy. Note also, *Red Ball Motor Freight*

v. Employers Mutual Liability Ins. Co., 189 F.2d 374 (5th Cir. 1951) and *American Automobile Ins. Co. v. Master Bldg. Supply & Lbr. Co.*, 179 F. Supp. 699.

In the case at bar, it cannot be reasonably contended that the collision did not arise out of the use of the private roadway by Appellant. Obviously, the collision would not have occurred but for the presence of the carryall upon the private roadway. Whether or not the collision was proximately caused by the operation of the carryall, by the operation of the train, or by both is immaterial. The hazard against which Appellee desired protection by the Private Roadway Agreement was the hazard created by the presence of large earth-moving equipment on its railroad track. And, it was the presence of such equipment on the track which gave rise to the collision.

All of the cases cited by Appellant are distinguishable or simply inapplicable. Cases are cited involving indemnity agreements which were held too general and indefinite; such is not the case here. Other cases are cited on the subject of proximate cause; these also are inapplicable.

The plain, obvious fact in this case is that the collision would not have occurred had not Appellant's vehicle stopped or stalled upon the railroad tracks of the private roadway in question. So long as that fact is true, the alleged negligent handling of the train is absolutely immaterial, because of the terms of the indemnity Agreement.

The railroad company was under no obligation to Appellant to permit it to cross the tracks. Absent any crossing of the tracks by Appellant, Appellee would be subjected to no hazard whatsoever. In giving Appellant permission to cross its tracks, Appellee received absolutely no benefit. All it did was accommodate Appellant, thereby obviously incurring a great hazard to itself. This was the reason for the indemnity Agreement. And the very hazard contemplated materialized

when Appellant's stalled vehicle blocked the oncoming train's path.

The Case of *County of Alameda v. S.P. Co.*, 360 P.2d 327 (Calif.), cited on page 29 of Appellant's Brief, affords no support for the contention that the indemnity agreement here was not intended to cover the loss arising from the collision in question. That case involved a claim of indemnity for breach of one of the terms of an agreement. There were express provisions of indemnity with respect to other terms of the agreement, but none with respect to the term that was breached. It is easy, therefore, to understand why the court refused to impose, as it said, an additional "independent obligation of indemnity by implication". (p. 333) That is not the case here; Appellant's obligation to indemnify Appellee is express, not implied.

The *Perry v. Payne* case, 66 Atl. 553, cited at page 31 of Appellant's Brief, a case in which indemnity was denied because of the indemnitee's negligence, is of no value whatever, because the indemnity agreement there did not contain the provision "regardless of any negligence of (indemnitee)". The court there simply refused to read such a provision into the agreement by implication. No such need exists here.

Boise Cascade Corp. v. Nicholson Mfg. Co., 221 F. Supp. 135, and *S.P. Co. v. Layman*, 173 Ore. 275, 145 P.2d 295, are in the same category as *Perry v. Payne, supra.*

Appellant contends that because Appellee is a common carrier and author of the Agreement, the use of the phrase "caused by" was employed with the meaning ascribed to it in common carrier cases. The decisions cited are inapplicable because Appellee was not acting in its capacity as a common carrier in its Agreement with Appellant. It was acting purely as an indemnitee, an insured. The controlling decisions are those previously cited herein construing the phrase "arising out of".

The *Standard Oil Co. v. Payne* case, 190 N.W. 769, cited at pages 33, 34 and 35 of Appellant's Brief, is not analogous. The distinction is that there the indemnity agreement covered losses "arising from operation of said side track for benefit of second party". The loss did not arise therefrom; it arose from operation of the railroad's *main line* for its *own* benefit, and thus the indemnity was held not to apply.

We reiterate, Appellee's loss here falls within the letter and the spirit of the indemnity Agreement.

The controlling authorities in this case are:

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co., 175 U.S. 91, 44 L.Ed. 84, which upheld as valid an agreement exempting a railroad from liability in the event of casualty regardless of its own negligence (so long as such agreement did not involve a common carrier relationship between the railroad and the other contracting party). This principle is stated in 17 *C.J.S.* Contracts, Sec. 262, p. 1166; 175 *A.L.R. Annotations,* p. 94; and 13 *C.J.S.,* Carriers, Sec. 117, p. 229.

Southern Pac. Co. v. Morrison-Knudsen Co., 338 P.2d 665 (Ore.), which upheld and enforced the appellant construction company's agreement to indemnify the railroad company from liability resulting from the presence or use of an unloading facility on a spur track installed for the construction company's sole use, regardless of any claimed negligence on the part of the railroad.

Rhinehart v. Southern Pacific Company, 38 F. Supp. 76, which held enforceable and not against public policy of Arizona, clauses in a lease and spur track agreement exempting the railroad from liability for losses caused by railroad's negligence.

The *Southern Pacific v. Morrison-Knudsen* case fits here like a glove. It is to be noted that in that case there was no provision in the indemnity agreement as we have here that railroad would be indemnified "regardless of any negligence

on its part". Notwithstanding the absence of such specific provision, the court held that the agreement could not be construed otherwise. Here in its contract with Western Constructors, the same railroad company employed a similar contract of indemnity, this time specifically providing for indemnity "regardless of any negligence or alleged negligence" on its part.

The Court Did Not Err in Placing Burden of Proof on Western

Appellee established a prima facie case of Appellant's liability under the indemnity clause of the Private Roadway Agreement, upon the latter's admission of these facts: (1) The existence of the Private Roadway Agreement (Ex. 4), and (2) that a collision occurred at subject crossing between one of Appellant's vehicles and Appellee's train. (Defendant's Answer)

These facts were all that were necessary in order to establish Appellee's right to indemnity under the Agreement for losses arising out of the presence or use of the crossing by Western.

The burden of proof was then on Western, to offer proof in support of its contention that the Agreement was unenforceable because of Appellee's alleged wanton negligence.

The crux of Appellant's argument seems to be that Appellee did not prove that the presence or use of the crossing "legally" caused or gave rise to the accident.

In answer, we submit that under the appropriate definition of the term "arising out of", as used in the Agreement and as previously discussed herein, mere proof of the collision between the train and the carryall at the crossing, is conclusive proof that the "presence" or "use" of the crossing caused or gave rise to the accident. There is no room for a finding or conclusion to the contrary, under the correct definition of terms used in the Agreement.

Appellant's argument here is really a repetition of its previous argument, which we have already disposed of.

Language of Indemnity Agreement Is Crystal Clear

Appellant's final argument is largely intertwined with its previous argument that the Agreement is equivocal and ambiguous. This we believe we have demonstrated not to be the case.

The contention seems to be that it is unclear what the phrase "regardless of any negligence or alleged negligence on the part of any employee of Railroad" modifies. The phrase is superimposed upon the entire indemnifying clause. It obviously means that there will be indemnity regardless of any negligence on the part of railroad's employees, under all the circumstances outlined in the entire sentence. No amount of juggling or diagramming can possibly change its clear meaning. In our opinion the sentence cannot even be improved upon. Appellant's diagram of the sentence is self-serving. The phrase "regardless of any negligence, etc." obviously modifies each of the (indemnifying) verbs.

CONCLUSION

We respectfully submit that the District Court properly interpreted the indemnity Agreement in accordance with its plain, unequivocal and unambiguous language, and that it properly concluded that there was no evidence of wanton negligence on the part of Appellee. The judgment of the District Court should be affirmed and the case remanded for trial to determine the amount of Appellee's damages.

Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

RALPH J. LESTER
Ralph J. Lester